that it was not, and the pursuer proceeded forward to look for room but could not find it. That was all natural enough, for a train fills up rapidly on such an occasion. The pursuer then goes on to say that he "returned to the guard, requesting to be allowed to travel in the van, in which there were a number of passengers who, in the knowledge and with the consent of the guard, were about to travel in the van. While in the act of entering the van, the train being then at a standstill, the guard, without warning or remark of any kind, pushed him back with his hand on the pursuer's breast, so violently that he stumbled, and to prevent himself from falling clutched hold of the handle of the carriage-door. The train at the same moment was, without any notice or warning, started, and dragged the pursuer backwards for some yards along the platform, and he being unable to regain his feet was thrown down between the carriages and the platform. The guard's van passed over his right arm and leg."

The train, it appears, got into motion just at the moment that a push was given by the guard to the pursuer. Now, it is to be observed that though it is averred by the pursuer that he requested to be allowed to travel in the guard's van, he does not say that his request was granted, or that any answer was made to it at all, nor does he even say that the guard remained silent. In short, there is nothing to show that he had any sanction whatever for trying to get into the van, and it must therefore be assumed that he attempted to enter the van without it. Now, that was illegal, since passengers are not entitled to enter the van but by permission of the persons in charge of the train. If, then, the pursuer, in entering the van as he did, was pushed back by the guard, it is impossible to say that the guard was not thereby doing his duty. The guard pushed him back to prevent him from entering the van, and also, probably, to prevent him from being injured by the train which was just starting at the time. The pursuer being thus pushed back, caught hold of and held on to the handle of the van. That was a most imprudent thing. If he had not held on as he did to this handle the accident would plainly not have happened. I am of opinion therefore that the pursuer's statements are irrelevant.

Lord Deas concurred.

Lord Mure — The point is not free from difficulty, but I do not see my way to differ from your Lordships. I go chiefly on the fact that the attempt of the pursuer to get into the van without permission was a step which a railway passenger is not entitled to take.

Lord Shand—I am entirely of the same opinion, and I give my opinion not on mere pleading, but because I believe that the substance of the case is fairly stated. I think that in the record a case is set forth in which no fault is stated against the defenders, and without fault there is no claim against the defenders. The pursuer summarises his case in Article 7—[*His Lordship here read Article 7, quoted supra*]. These words must of course be read with reference to the statements made in the previous articles. Now, so far as the want of accommodation goes, I think that a passenger in such circumstances as the pursuer was here placed in must remain behind. We all know that on such an occasion a train is rapidly filled up, and that it is often necessary for a passenger in the pursuer's position to wait till another train is made up and sent off. Therefore as far as want of accommodation goes, that did not conduce to the accident. The same thing must be said of want of sufficient number of officials, and of want of sufficient warning that the train was about to start. The statement of the pursuer is that he endeavoured to enter the van when the train was just starting, and that the guard pushed him back when unhappily this accident occurred. I think the statement is irrelevant.

The Lords recalled the interlocutor of the Lord Ordinary and dismissed the action.

Counsel for Pursuer—J. C. Smith—J. A. Reid. Agent—D. H. Wilson, S.S.C.

Counsel for Defenders—J. P. B. Robertson—MacWatt. Agents—Millar, Robson, & Innes, S.S.C.

Friday, July 14.

FIRST DIVISION.

[Sheriff of Midlothian.

NEWLANDS *v.* MILLER.

Husband and Wife—Marriage-Contract—Bankruptcy—Lapsed Trust—Right of New Trustee to Claim in Husband's Sequestration.

A trust created by an antenuptial contract of marriage had lapsed by the death and resignation of the original trustees, and was revived by the spouses appointing a new trustee, subsequent, however, to the husband's sequestration; by the terms of the trust the wife's estate, *acquisitum et acquirendum*, was conveyed to the trustees for payment of the proceeds thereof to the husband so long as the marriage subsisted, and the fee to the wife or her heirs on its dissolution; the Lords thought that the trustee had been competently appointed by the spouses, but *held* he was not entitled to claim in the husband's sequestration for money to which the wife had succeeded during the subsistence of the marriage, and for which a discharge had been granted by the spouses, who had uplifted it, valid by the terms of the deed through which the money had come.

By antenuptial contract of marriage Thomas Laidlaw, sometime builder in Innerleithen, and subsequently hotel-keeper in Stirling, assigned and conveyed to certain persons mentioned in the deed, and to such others as might be assumed under the powers contained in it, the subjects and sums of money therein specified, but always in trust for the ends and uses mentioned therein. On the other part, Catherine Stewart or Laidlaw, with the consent of the said Thomas Laidlaw, assigned and conveyed to trustees her whole means and estate, both what then belonged to her or which might pertain to her during the subsistence of the marriage, exclusive of the *jus mariti* and right of administration of her said in-

tended husband. The produce of her estate was to be paid over to her husband while the marriage subsisted, and on its dissolution the fee or capital was to be paid over to her or her heirs. The parties mentioned in the deed accepted of the office of trustee, and entered into possession of the estate and effects thereby conveyed. Part of the effects conveyed to the trustees consisted of two policies of assurance, one for £100 effected with the Scottish National Insurance Co., and dated 1st June 1866, and the other for £200 effected with the Life Association of Scotland, and dated 4th June 1867, and the assignations of these policies to the trustees were duly intimated to the respective insurance, companies. In 1869 Mrs Laidlaw succeeded, at the death of a relative William Stewart, to one-fourth part of the residue of his trust-estate, which was made payable to her exclusive of the *jus mariti* and right of administration of the said Thomas Laidlaw or of any husband whom she might thereafter marry; and it was further provided by the terms of Stewart's trust-disposition that receipts for this money granted by Mrs Laidlaw alone should be good and effectual discharges therefor. To this succession which opened to Mrs Laidlaw some time after her marriage the trustees under the antenuptial contract failed to make up any title, nor did they make any intimation to Stewart's trustees of the assignations in their favour under the marriage-contract, or obtain possession of the fourth part of the residue of his estate.

It appeared that before any division of Stewart's estate had taken place Laidlaw had obtained various advances of money in connection with his business, in particular a sum of £300 lent by an accountant in Edinburgh of the name of Hart, and also a sum of £2000 advanced by Mr James Somerville, S.S.C., in security for both which loans bonds and assignations in security of their rights under Stewart's settlement were granted by the spouses and were duly intimated to Stewart's trustees. On the 6th of May 1873 Mr and Mrs Laidlaw granted a discharge to Stewart's trustees, who had made payment of the fourth part of the residue of his estate by extinguishing the two bonds for £2000 and £300, and by handing over the balance to the spouses. This discharge bore to be for the sum of £3246, 10s. 5d. By deed of nomination dated 28th February 1880, proceeding on the narrative that the trustees originally appointed under Mr and Mrs Laidlaw's marriage-contract had either died, resigned, or declined to act, the spouses revived the trust by appointing Mr Newlands, S.S.C., a new trustee. The last surviving trustee had died on 28th March 1880, and before the appointment of Mr Newlands to the office Mr Laidlaw having got into difficulties his estates were sequestrated on the 8th of March 1878, and Mr Hugh Miller, the respondent in the present appeal, was appointed trustee.

The policy of insurance with the Scottish National Insurance Company taken out by Mr Laidlaw, and assigned by him to the marriage-contract trustees, had from some cause been allowed to lapse; this Newlands, acting under the revived marriage-contract trust, restored by effecting a new policy on 1st August 1880 for £100 with the Life Association of Scotland, and paying the premiums thereon.

On the 18th of January 1881 Newlands lodged an affidavit and claim in Laidlaw's sequestration for £3246, 10s. 5d., which was the amount of the share of William Stewart's estate to which Mrs Laidlaw had succeeded. This claim was rejected by the trustee Miller, the respondent in the present action, and his deliverance was in these terms:—"The trustee rejects this claim in respect the whole interest of the bankrupt and his wife, Mrs Catherine Stewart or Laidlaw, in the estate of the deceased William Stewart was discharged by them on joint receipt and discharge dated 6th May 1873. Further, prior to said date the bankrupt and his wife, ignoring the pretended conveyance in the antenuptial contract of marriage, dealt with the interest of the bankrupt's wife in the estate of the said William Stewart as their own property in the same way as if no contract had been executed. In fact, so far as regards the interest of the bankrupt's wife in William Stewart's estate, the pretended marriage-contract appears to have been held as a latent deed, and inoperative."

On the 23d March 1881 Newlands lodged another affidavit and claim for the value of the premiums of assurance. This claim was also rejected by the trustee, as follows:—"This claim is rejected, in respect the bankrupt, who has been discharged, is taken bound to pay all premiums on the new policy produced, and the trustee cannot recognise an arrangement made under the marriage-contract now produced to keep up the life policy, which had lapsed long prior to the date of the bankruptcy. The policy on which the premiums now claimed are payable was not effected till after the bankrupt had been discharged."

Against both of these deliverances of the trustee an appeal was taken to the Sheriff of Midlothian, who on 14th April 1882 pronounced the following interlocutor and note:—"Finds that it was *ultra vires* of the bankrupt and his wife to grant the deed of nomination and appointment founded on, to the effect at least of giving the appellant a title to claim in the sequestration, and finds that the appellant has no such title; upon that ground sustains the deliverance appealed against, rejecting the appellant's claim; dismisses the appeal, and decerns," &c.

"*Note.*—The object of the deed in question was to resuscitate the bankrupt's marriage trust, which, if it was ever operative, had lapsed through the death or resignation of the trustees originally appointed. That object, it is thought, could only be attained through the machinery of an action of declarator, in which all the parties interested, including the bankrupt's creditors, would have been called into the field, and their respective rights ascertained.—*Lindsay and Spouse* v. *Lindsay*, 19th June 1847, 9 D. 1297; *Tovey* v. *Tennant*, 11th March 1854, 16 D. 866.

"Apart, however, from this objection, it seems too clear for argument that a bankrupt cannot, by a deed granted by himself after sequestration, confer a title to rank upon his own sequestrated estate."

Against this interlocutor an appeal was taken by Newlands to the Lord Ordinary on the Bills and to the First Division, in terms of sec. 170 of the Bankruptcy (Scotland) Act of 1856.

Argued for the appellant—Newlands' title to act was good, for when trustees under a mar-

riage-contract die or cease to act there remains a radical right in the parties who appointed them to re-appoint others. There is nothing to deprive the parties of this power unless it be the Bankruptcy Statutes. No new claim has been reared up in anyone; it pre-existed; Laidlaw's estate became a debtor for the amount from the moment the money was paid to him. The appellant is entitled to be ranked as a creditor on the sequestrated estate.

Authorities—M'Laren's Wills and Succession, vol. ii., pp. 217 and 218; Bankruptcy Statute 1856 (19 and 20 Vict. cap. 79); *Menzies* v. *Murray*, 2 R. 507.

Argued for respondent—The antenuptial contract of marriage has been all along ignored by the spouses, and cannot now be treated as a subsisting deed. The title to heritage conveyed by a trustee so nominated would be bad. The trustee has no title to make the present claim, his appointment being invalid. The trustee for creditors should have had a voice in the nominating of new trustees under the marriage-contract.

Authorities—*Hutchison* v. *Hutchison's Trustees*, 10th June 1842, 4 D. 1399; *Ramsay* v. *Ramsay's Trs.*, Nov. 24, 1871, 10 Macph. 120; *Lindsay* v. *Lindsay*, 19th June 1847, 9 D. 1297; *Tovey* v. *Tennant*, 11th March 1854, 16 D. 866.

At advising—

Lord President—In this case sequestration was awarded on the 8th March 1878, and the affidavit and claim of the appellant is dated 18th January 1881. In it he sets himself forth as sole trustee acting under the antenuptial contract of marriage entered into between Thomas Laidlaw, sometime builder in Innerleithen, now hotel-keeper in Stirling, and Mrs Catherine Stewart or Laidlaw his wife; and he alleges that the bankrupt is indebted and still owing in the sum set forth in an account which he produces, amounting to £3246, 10s. 5d. The account shows that the sum upon which the appellant desires to be ranked was a share of the estate of the deceased Wm. Stewart to which Mrs Laidlaw succeeded, and which fell, he maintains, under the trust which he now represents. The marriage-contract is dated 6th and 7th June 1867, and contains provisions by the husband in favour of persons therein named as trustees, to whom are conveyed certain policies of assurance, as well as the whole household furniture, bed and table linen, china, silver plate, books, paintings, engravings, and generally everything belonging to the said Thomas Laidlaw, for the purposes therein mentioned.

It was further provided by this deed that in the event of the wife predeceasing, the whole effects conveyed by the husband were to revert to himself and to his heirs, and effect is given to this provision in the third purpose, which is in these words:—"That in the event of the dissolution of the said marriage by the decease of the said Catherine Stewart before the said Thomas Laidlaw, the said trustees shall forthwith assign, dispone, and make over to the said Thomas Laidlaw and his heirs the whole of the estate and effects hereinbefore disponed to them by the said Thomas Laidlaw." The other part of the contract refers to Mrs Laidlaw's estate, and she "conveys and makes over to and in favour of the said Duncan Stewart, Robert Russell, and Robert Combe, and their foresaids, as trustees, for the ends, uses, and purposes after mentioned, All and Sundry goods, gear, debts, and sums of money, as well heritable as moveable, that are now belonging to her, as also whatever property, means, estate, and effects, heritable and moveable, real and personal, may pertain to her in any way during the subsistence of the said intended marriage, other than the provisions in her favour contained in this contract: And the said Thomas Laidlaw hereby resigns and renounces his *jus mariti*, right of courtesy and administration, and all other rights competent by law to him, or which he could claim or exercise in consequence of said marriage, in relation to all such property, means, estate, and effects: And the said Catherine Stewart, with the special advice and consent of the said Thomas Laidlaw, binds and obliges herself and her foresaids, and the said Thomas Laidlaw binds and obliges himself and his foresaids, to make, execute, and deliver all deeds and writings necessary for fully implementing the conveyance last above written: Declaring that the said trustees shall have power to invest the proceeds of the estate and effects of the said Catherine Stewart, when the same shall be received by them, in such securities, real or personal, as they may consider expedient, and shall pay over the produce thereof to the said Thomas Laidlaw during the subsistence of the said marriage; and upon the dissolution of the marriage the said trustees shall pay or make over to the said Catherine Stewart, or her heirs, the fee or capital of the said estate and effects hereby conveyed by her to them." Now, this is the whole of the marriage-contract. It appears, however, that Mrs Laidlaw succeeded during the subsistence of the marriage to some money by the settlement of a relative named William Stewart. This settlement bears to be dated Oct. 8, 1868, and by its sixth purpose the testator, in disposing of the residue of his estate, directs his trustees to pay "one fourth part or share thereof to Mrs Catherine Stewart or Laidlaw, wife of Thomas Laidlaw, residing in St John Street, Edinburgh, whom failing to her child or children, if more than one, equally among them, share and share alike; declaring that the said one fourth part or share shall be paid to the said Mrs Catherine Stewart or Laidlaw exclusive always of the *jus mariti* and right of management of the said Thomas Laidlaw, or of any husband she may thereafter marry, and that the receipts or discharges for the same, or other deeds in relation thereto, to be granted by the said Mrs Catherine Stewart or Laidlaw alone, without the consent of such husband, shall be good and effectual discharges for the same."

Now, it appears that there was no intimation of any kind made to Stewart's trustees by the trustees under the marriage-contract, nor is there any evidence that Stewart's trustees knew of the existence of this marriage-contract trust. On 23d February 1870 Mr and Mrs Laidlaw granted a bond and disposition for £300 to Thomas Hart, an accountant in Edinburgh, with an assignation in security over Mrs Laidlaw's interest in William Stewart's estate. This assignation appears to have been duly intimated to Stewart's trustees. Again, on the 20th of January 1871 it appears that the spouses granted another bond, on this

occasion for £2000, in favour of James Somerville, S.S.C., and again granted an assignation in security over Mrs Laidlaw's interest in Stewart's estate, and this assignation was also intimated to Stewart's trustees. This estate hitherto had remained undivided in the hands of the trustees, and if these sums were borrowed by Laidlaw for the purposes of his business he became bound to repay the amount thus borrowed, for the assignations which were granted on both occasions were completed provided the spouses had the power to grant them. In the month of May 1873 Mrs Laidlaw's share of Stewart's estate became payable, and the way in which it was paid was by the trustees extinguishing these two bonds, and by their handing over the balance to Mr and Mrs Laidlaw. The details of this settlement are quite clearly brought out, but it seems to me unnecessary to go over them at any length.

The discharge which was granted by Mr and Mrs Laidlaw is dated 6th May 1873, and there can be no doubt that it is a valid discharge so far as the spouses are concerned, for the deed is complete and formal in every respect. It was also valid as regards Stewart's trustees, for the deed under which they acted allowed them to accept Mrs Laidlaw's receipt, and they had no idea of any other claim to the money than Mr Laidlaw's, nor was it until March 1878, at which time Mr Laidlaw became bankrupt, that they became aware of the existence of the trust under the marriage-contract. Now, it appears that the marriage-contract trust lasted until three weeks after the date of Laidlaw's sequestration, at which time it lapsed owing to the death of the last trustee. Matters remained in this position until the 28th February 1880, when, through the nomination by the spouses of the appellant, and his acceptance of the office, the trust was revived. Now, there could be no great harm in reviving the trust, provided that it could be validly done; for not only was there Mrs Laidlaw's interest to be considered, but there were also the interest in Stewart's estate, and the purpose for which the trust was created by Mr Laidlaw, that is, the provisions in favour of Mrs Laidlaw.

But suppose the appellant Newlands' nomination to be a good one, the question still remains whether he is entitled to rank for what was paid over by Stewart's trustees? Was Laidlaw at the date of his sequestration debtor to his wife for the amount which he had received? If not, then the appellant's claim cannot be sustained. If the money was validly uplifted in spite of the marriage-contract trust, then there is an end of the present claim. But if we consider the nature of Mrs Laidlaw's interest in the marriage-contract we shall find that it is a contract in favour of the wife if she survives; it is a liferent of everything with a power of disposal. Now, has anything occurred to make Mrs Laidlaw renounce her rights under this contract? It might, no doubt, be said that she could not renounce; but is there any provision in favour of Mrs Laidlaw relating to her personal estate? She conveys it all to the marriage-contract trustees, but merely so conveying does not constitute a provision, if no purpose exists for which it is to be so tied up.

It remained the property of Mrs Laidlaw just as fully and completely as if there had been no conveyance. She consented, no doubt, that the income should be paid to her husband during the subsistence of the marriage, but law would have carried this out without the necessity of any trust. The trustees could pay the capital to nobody but to Mrs Laidlaw or her heirs, and the interest to her husband. Now, could not the wife take that money out of the trust? If so, could it not be prevented from coming into the trust, as was done by the spouses going to Stewart's trustees and getting from them the money? It seems to me that this case closely resembles that of *Ramsay's Trustees*, and is not to be ruled by the case of *Menzies* v. *Murray*. There is here no provision in favour of children, except the very vague one referred to in the marriage-contract—that in the event of there being any children born of the said marriage they shall be maintained in a proper manner, and suitable provision be made for them. Indeed, the only interest created is that of the liferent and power of disposing of the husband's property in favour of his wife, and that provision remains good to the present time, and makes the present case distinguishable from the case of *Menzies* v. *Murray* to which we were referred, where the wife conveyed all her property to trustees for payment of the revenue to the spouses in liferent, and the fee to the children of the marriage. Now, what took place in the present case in the years 1870 and 1871, when the money was paid over by Stewart's trustees? Did Mrs Laidlaw make her husband a donation of this sum, or did she advance it to him by way of loan? It does not appear to me to make any difference which of the two she did, as in neither case do I think that the appellant Newlands can claim. I say nothing of the nature of this advance as between the spouses; the only party before us is the trustee representing the marriage trust, and it appears to me that he cannot be successful in his application, because I think that the spouses were entitled to keep this money out of the trust, or if it was in, to take it out. I therefore think that the deliverance of the trustee in the sequestration is well founded.

Lord Deas—In this case there are several long prints, including a number of deeds and depositions of parties concerned, and it requires a good deal of care and attention to select from these deeds the evidence upon the points in question. The provisions which we have to deal with arose from a trust-disposition by William Stewart, and it is very necessary to see under what conditions Mrs Laidlaw got this money. The amount was a fourth part of the residue of his estate, and it was to be paid to her exclusive of the *jus mariti* and right of management of this or any other husband whom she might marry, and receipts granted by her were to be good and effectual discharges. Along with this we must look at the antenuptial marriage-contract between Laidlaw and his wife, by which we see that in addition to two policies of insurance the husband made over everything that he had to trustees, who were to hold that for the liferent use of Mrs Laidlaw if she survived her husband, and in the same event to pay over the proceeds to such persons as she might direct, but if Laidlaw was the survivor they were to make over the whole estate to him and his heirs; and on her part Mrs Laidlaw made over all her property to trustees, and the annual produce was to be paid to her husband during the subsistence of the marriage, and at its dissolution the fee of the

estate was to be paid by them to her or her heirs, and the trust was declared not to come to an end until all its purposes were fulfilled. Now, that marriage-contract was dated on 6th June 1867, and then on 6th May 1873 we have the discharge granted by Laidlaw and his wife to Stewart's trustees, about which time the money was paid over to the spouses or used by the trustees to pay the husband's debts. The only other deed that need be noticed is the minute of resignation by Duncan Stewart (Mrs Laidlaw's brother) on 2d July 1877 of his office of trustee under the marriage-contract. The trustees under this marriage-contract had, it seems, all accepted office, and had acted for some time. In my opinion a marriage-contract does not cease to exist because the spouses have no occasion to act upon it. I cannot understand upon what principles a regular formal deed should cease to be operative merely because nothing for a good while is done under it. On the 19th of March 1880 the husband and wife concur in appointing Mr Newlands as a trustee under this marriage-contract, and what objection can be taken to their so doing I cannot see. Surely there was nothing came out in the proof to show that this money was intended to be a gift to the husband, and there is nothing that I can see to prevent her being a creditor of her husband for the amount so advanced except the existence of this trust. But Mrs Laidlaw retained all her rights through her trustees. Therefore I think that the the trustee Newlands has a perfectly good title to rank in the sequestration, for the alternative would be, that if he is not entitled to rank, neither would Mrs Laidlaw be, but, as I have already said, I think she is entitled to exercise her rights through her trustee.

Lord Mure—There are two points of considerable importance, both of which are dealt with by the Sheriff-Substitute. The one is the power of Mr and Mrs Laidlaw to resuscitate this trust, and to appoint Mr Newlands as trustee under the marriage-contract; and the other is, assuming that the claim of the trustee to rank on Laidlaw's estate for the amount to which Mrs Laidlaw succeeded from William Stewart's estate is good, did that make it a good claim in a sequestration? It is clear, I think, that one of the objects of the marriage-contract was to secure that the annual produce of the estate was to be paid to the husband during the subsistence of the marriage. The fee was to be paid to the wife if she survived, or to such persons as she might nominate. There is no provision of any importance for children, though they are referred to incidentally in an earlier part of the marriage-contract. As to Stewart's trust, from its very nature, the estate fell to be divided at the death of the truster, and on that being done, and the money paid over, the trustees obtained a clear and distinct discharge. Mrs Laidlaw gives some explanation in her evidence about the amount which was advanced to her husband, in return for which the bonds and assignations were granted, but it appears to me that she is not very clear about the amount nor about the circumstances connected with these payments. The original trustees under the marriage-contract having resigned or died, the trust had lapsed, but it was resuscitated about the time of Laidlaw's bankruptcy, and the appellant appointed, who now claims to be ranked for the sum to which Mrs Laidlaw succeeded from Stewart's estate, on the ground that it had been improperly paid by his trustees to Mrs Laidlaw. Laidlaw himself explains in his evidence that when he nominated Newlands he did not desire any claim of this kind to be made, but agreed to the appointment in order to get a portion of the estate of a sister of Mrs Laidlaw's who had died, and a trustee was found necessary in order to obtain this share.

Newlands' claim was rejected by the trustee in the sequestration; the Sheriff-Substitute is of the same opinion, and in raising the question of title holds that Newlands has not a good title to make this claim. It appears to me that the trustee in the sequestration was quite right, and I agree in this matter with your Lordship, and on the grounds which have been stated.

The discharge which was granted to Stewart's trustees by the spouses seems to me to be in all respects a good one, and I do not think it necessary to refer to the cases which were cited, and which were commented on by your Lordship. I have only to add that on the question of Newlands' title, the claim being in my opinion a bad one, I do not need to consider the question of the trustee's title. Had I been called upon to do so, I might have taken a different view of the matter from that which the Sheriff-Substitute has expressed in his interlocutor. Upon the whole matter I concur with your Lordship in the opinion which you have expressed.

Lord Shand—The Sheriff-Substitute has dismissed both the claims which have been referred to in the present case, on the ground that the appellant Newlands had no title. It appears to me that we are called upon to decide at this time the question of the validity of the claim, not only to the £3246, but also to the premiums of assurance, to which I do not think that your Lordships made any reference. I am of opinion that the views of the Sheriff-Substitute cannot be sustained. In a case such as this, where trustees are needed by the parties, if from any cause the trust should come to an end, it seems to me that it is in the power of those who created the trust to provide the proper machinery for keeping it in motion. Having the radical right, if the trustees fail, the trustees are entitled to name other trustees.

In the case of *Lindsay*, to which reference was made, the Court was asked to name new trustees, and refused, holding that the parties had the right to do so themselves. To the same effect was the case of *Tovey*, the result of all which is that parties need not come to the Court asking for declarator of their rights, for the Court has said that the power to make such appointments exists in the parties creating the trust. Therefore I think that the view of the Sheriff-Substitute on this point cannot be sustained, and that the spouses were entitled to revive the trust by naming new trustees. Special circumstances might have arisen in which the bankrupt might have desired to create a trust for the benefit of third parties, and might have required its organisation to keep the machinery in motion for their interest.

But then comes the question, Is Newlands entitled to claim and to rank in Laidlaw's sequestration? Now, I do not think that Newlands' right is by any means so clear on this point. I

have no doubt that the money was properly paid by Stewart's trustees to Mr and Mrs Laidlaw, who in return gave a valid receipt and discharge therefor. It appears that this money was advanced clearly with the wife's consent. She agreed to assign her interest in Stewart's estate in return for the advance which was made to her husband. Now, this took the money out of the trust. Could the spouses effectually do so; was it not *ultra vires?* This question depends upon whether in the construction of the provisions of the marriage-contract this case is to be ruled by the case of *Ramsay* or the case of *Menzies*. If the former, then as the husband and wife were entitled to take the money out of the trust, Newlands is not entitled to make the present claim. Now, it appears to me that this fund was entirely at the wife's disposal, and it is further to be observed that there is no interest in the fund given to children; therefore I agree with the majority of your Lordships in thinking that this case resembles and is governed by the case of *Ramsay*.

I wish to give no opinion as to whether the wife is entitled to rank in this sequestration or not. Mrs Laidlaw may have made a donation of this money, or it is possible that she may only have intended to lend it, in which latter case it is possible that she may obtain a ranking.

The Court refused the note of appeal, and adhered to the interlocutor appealed against.

Counsel for Appellant — Pearson — Shaw. Agent—Andrew Newlands, S.S.C.

Counsel for Respondent—Mackintosh—Wallace. Agents—Millar, Robson, & Innes, S.S.C.

Friday, July 14.

FIRST DIVISION.

JAMIESON & OTHERS *v.* MACKINNON.

Process—Expenses—Agreement.

In the Auditor's taxation of an account of expenses of a process where objections were taken (1) to the fees allowed by him to professional accountants, and (2) to the manner in which he proposed to deal with the accounts for printing, which were exceptionally large—the Court, after hearing parties, *altered* his finding on the first branch and increased the allowance by one-third in respect of the quantity and quality of the work done, and *found* on the second branch that by agreement of parties the whole of the printing account fell to be paid by the losing party.

In the case of *Jamieson and Others* (*Liquidators of the City of Glasgow Bank*) v. *Mackinnon*, reported *ante*, p. 278, their Lordships of the First Division, by interlocutor of 23d December 1881, *inter alia*, found the respondent William Mackinnon entitled to expenses, allowed an account thereof to be lodged, and remitted the same to the Auditor to tax and report.

On the 18th March 1882 the Auditor issued his report taxing the respondent's account at £3619, 9s. 6d., and he added a note for the guidance of the Court in the event of objections being lodged to his report.

On the 12th May 1882 a note of objections was lodged by the respondent, who objected to the said report in so far as it disallowed various items specified therein, amounting in all to £2764, 14s. 8d.

In the note appended to his report the Auditor referred to the account of expenses in the ordinary action raised by the liquidators in the Outer House prior to the instituting of the proceedings before the First Division of the Court. That action was sisted immediately after the closing of the record, and without any debate, to await the issue of the Inner House case. In consequence of the decision of the Inner House that action was abandoned, and the account of expenses incurred in it was taxed at £1673, 12s. 10d.

The respondent objected to this taxation in so far as it disallowed items amounting to £941, 6s.

On the 13th May 1882 Lord Kinnear issued the following interlocutor:—"The Lord Ordinary in respect it is stated that the same question of audit between the same parties is in dependence before the First Division of the Court, reports this cause to the Lords of that Division, and grants warrant for enrolling in the Inner House rolls."

When the case came on for discussion it was argued for the objector Mackinnon—(The Auditor had classified the expenditure under various heads):—(1) *As to charges for printing*—The effect of the agreement between the parties contained in their correspondence, which is quoted by the Lord President, was that 500 copies of the large print were to be thrown off, and that to give effect to the proposal of the Auditor would virtually be to review the agreement between the parties. By the 28th April 1881 the print was complete, and at that date each party had got, or there was lying at their order, 250 copies. Owing to the magnitude of this case unusual expense was unavoidable. (2) *As to accountants' charges*—The sum allowed by the Auditor quite inadequate. In a case such as this a charge should be allowed for accountants' work in the preparation of the record. The sum claimed was reduced after the summons was raised owing to what was brought out by the accountant Harding.

Authorities—*Millar* v. *Ure*, 1853, 15 D. 781; *Inglis* v. *Baird*, May 1861, 23 D. 872.

Argued for the liquidators:—(1) *As to printing account*—The auditor availed himself of the assistance of a printer in fixing the amount that should be charged under this head. Down to August 1880 there was no agreement between the parties for more than the ordinary 60 copies, and nothing can be gathered from the subsequent letters to enlarge the responsibilities of parties. There was no agreement that the losing party should pay extra charges. (2) *As to the accountants' charges* — Two professional men ought not to be paid as for separate work when one of them simply revised and checked the work done by the other.

At advising—

Lord President—The Auditor's report on the respondent's account of expenses, and the note of objections taken to it, raise three points for our consideration. First, the respondent objects to the disallowing of various items in the account for printing amounting to £367; second, to the